Supreme Court, U. S.
FILED
NOV 29 1979

No. 79-599

In the Supreme Court of the United States

OCTOBER TERM, 1979

VIRGIL R. RIZZO, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D. C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-599

VIRGIL R. RIZZO, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner appealed from two orders of a United States Tax Court Special Trial Judge which denied his pretrial motion for a more definite statement in the pleadings and his motion to revise the first order. Petitioner now seeks review in this Court of the court of appeals' dismissal of the appeal for lack of jurisdiction.

1. The court of appeals correctly dismissed petitioner's appeal. Appellate jurisdiction over adjudications of the United States Tax Court is conferred on the courts of appeals by Section 7482(a) of the Internal Revenue Code of 1954 (26 U.S.C.). It is well settled, however, that only final "decisions" of the Tax Court are appealable under that provision. *Ryan* v. *Commissioner*, 517 F. 2d 13, 16 (7th Cir.), cert. denied, 423 U.S. 892 (1975); *Porter* v. *Commissioner*, 453 F. 2d 1231 (5th Cir. 1972); *Licavoli* v.

Commissioner, 318 F. 2d 281 (6th Cir. 1963); *Commissioner* v. *Smith Paper*, 222 F. 2d 126 (1st Cir. 1955). In the context of proceedings to redetermine deficiencies of income tax, a "decision" of the Tax Court is one which determines the amount of a deficiency, dismisses a petition, or otherwise ends the litigation between the parties. *Ryan* v. *Commissioner*, *supra*, 517 F. 2d at 16; *Porter* v. *Commissioner*, *supra*; *Commissioner* v. *S. Frieder & Sons Co.*, 228 F. 2d 478 (3d Cir. 1955).

These cases have not been tried by the Tax Court, and thus no final decision has been reached. Since the Tax Court's orders denying the pretrial motions neither redetermined the deficiencies asserted nor dismissed the proceedings before it, those orders did not constitute "decisions" within the meaning of Section 7482(a).

Contrary to petitioner's assertions (Pet. 8-10, 15-16), there is no statute granting jurisdiction over appeals from dispositions of pretrial motions. The Federal Rules of Appellate Procedure are not a grant of jurisdiction over any appeal; by their express terms, they neither extend nor limit statutory jurisdiction. Fed. R. App. P., Rule 1(b). Likewise, petitioner's reliance on 28 U.S.C. 1292 is misplaced. Congress has never extended to Tax Court proceedings the exceptional provisions of 28 U.S.C. 1292(b) permitting interlocutory appeals, in the discretion of the court of appeals, from certain orders of district courts. *Ryan* v. *Commissioner*, *supra*, 517 F. 2d at 16; *Commissioner* v. *Smith Paper*, *supra*, 222 F. 2d at 128.

By dismissing the appeal, the court of appeals did not deprive petitioner of due process. Even though these "Interlocutory orders of the Tax Court are not immediately reviewable, * * * they are reviewable later

when a review is taken of the final 'decision' of the Tax Court." *Licavoli* v. *Commissioner*, *supra*, 318 F. 2d at 282. Moreover, petitioner was not prejudiced by the court of appeals' refusal to consider petitioner's supplemental memorandum. That memorandum presented arguments on the merits of the Commissioner's determination of deficiencies and did not address the jurisdictional question.

United States v. *California Eastern Line*, 348 U.S. 351 (1955), upon which petitioner relies (Pet. 14), does not conflict with the decision below. There, the Court merely defined which orders of the Tax Court under the commonly known as Renegotiation Act, Ch. 247, 56 Stat. 226, were final orders of the Tax Court for purposes of Section 7482. That decision did not alter the rule that in proceedings for the redetermination of income tax deficiencies, a "decision" of the Tax Court is a final ruling determining the amount of tax due from a taxpayer.[1]

---

[1]Nor do the other cases cited by petitioner (Pet. 11) stand for the proposition that a court of appeals must determine the merits of an appeal or write an opinion in order to determine it is without jurisdiction to hear an appeal. *Ryan* v. *Commissioner*, *supra*, recognizes that the court of appeals has no jurisdiction over interlocutory orders of the Tax Court. *May* v. *Commissioner*, 553 F. 2d 1207 (9th Cir. 1977), followed the well-established rule that an order denying intervention is not appealable unless the trial court abused its discretion. *Falik* v. *United States*, 343 F. 2d 38 (2d Cir. 1965), involved appellate jurisdiction over the interlocutory order of a district court by the certification procedure of 28 U.S.C. 1292(b). Finally, *Louisville Builders Supply Co.* v. *Commissioner*, 294 F. 2d 333 (6th Cir. 1961), dealt with an attempt to seek a Tax Court order to perpetuate testimony by way of deposition. Indeed, the court observed (294 F. 2d at 336) that the decisions holding that interlocutory orders "entered by the Tax Court in the course of a plenary consideration of the assessment of a tax deficiency" to be nonappealable were distinguishable.

2. Finally, petitioner argues (Pet. 11) that the court of appeals was required to express an opinion on the application of the "collateral order" doctrine of *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949). Petitioner does not assert that the doctrine applies to his case or that the issues he seeks to raise on appeal are collateral to the main issue in suit and that they are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated" (*id.* at 546). An order denying pretrial motions is neither within that class of collateral orders nor independent of the main cause of action.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1979

DOJ-1979-11